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ABSTRACT

In the midst of a trend toward uniformity of education, parents, teachers, community groups, and government groups are struggling for control over what that education shall be. Regarding problems concerning religious and ethical education, the courts' interpretations of the establishment clause ultimately conflict with interpretations of the free exercise clause. Case origins of contemporary constitutional guidelines regarding parental rights over a child's religious education concern state regulations of private schools, prayer, Bible-reading, and evolution cases in public schools, and financial aid to religious schools. Parents who are not satisfied with public education have two real options--attempting to control and influence the public schools or pursuing alternative education at home or in private schools. Parents' ability to influence their child's public schooling is limited both by law and by practical considerations, as evidenced by court cases regarding the teaching of evolution or sex education, a child's exposure to sexually explicit or offensive material, and parents' right to determine a program for their handicapped child. Parents who pursue alternative nonpublic education have problems evidenced by court cases regarding state regulation of private schools. Parents who choose home instruction confront state laws concerning what constitutes instruction equivalent to that or public schools. (Author/JM)

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TO THE EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC) AND USERS OF THE ERIC SYSTEM."

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I

The Underlying Problem of Pluralism

American education suffers from the same ailment that twists many other aspects of our lives, namely, the urge for instant solutions, ready-made by government, the official quick-fix. This impatience to get things done may work well for business production and for serving up fast-food hamburgers, but it tends to confuse and, thereby, damage our pursuit of educational goals. A jingle spawned in the Berkeley uprising catches the point:

> From the tip of San Diego
> To the top of Berkeley's hills
> We have built a might factory
> To impart our social skills.
> Social engineering triumph,
> Managers of every kind
> Let us all with drill and homework
> Manufacture human minds.

Mass produced minds are definitely not what we want, but the thrust of modern government toward uniformity is undeniable, even in pluralistic, democratic America. It was clearly anticipated by Mr. Justice Jackson in the flag-salute case:

> "As governmental pressure towards unity becomes greater, so strife becomes more bitter as to whose unity it shall be. Probably no deeper division of our people could proceed from any provocation than from finding it necessary to choose what doctrine and whose programs public educational officials shall compel youth to unite in embracing." 1/

Mr. Justice Jackson noted that "Compulsory unification of opinion achieves only the unanimity of the graveyard,"[2/] and that the essence of liberty was not confined to matters of religion,

but to "freedom of mind, the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control." 3/ Nor was he given to romanticism, for he recognized the difficult task of translating majestic constitutional generalities, that were forged in a simpler age, to serve modern society:

> "We must transplant these rights to a soil in which the laissez faire concept of principle of non-interference has withered * * * and social advancements are increasingly sought * * * through strengthened governmental controls. These changed conditions often deprive precedents of reliability and cast us more than we would choose upon our own judgment." 4/

Who can deny that our interest group dissentions reflect in part at least the intolerance against which Mr. Justice Jackson warned? Education today, both public and private, is the object of a struggle for control, between parents, teachers, community groups and government agencies. Our political, religious and legal institutions are caught up in this struggle, and rational argument regarding both ends and means, has been clouded by heated partisan debate:

> "Education is inherently subject to a struggle for control. * * * Parents may well have different interests in their child's education. * * * But when education moves outside the home, * * * this intrafamily conflict is overshadowed by that which occurs between the family, and the community which operates the school. In more recent years, a second shift * * * has occured; a shift from family versus school, or family versus community, to local community versus the state * * * or local community versus the national government." Coleman, The Struggle for Control of Education, Education and Social Policy: Local Control of Education 64 (1970).

"Most people don't know who controls American education because little attention has been given the question by either educators or the public. The field of education, even though it consumes a giant's share of the nation's resources, has until recently received little political anaylsis. * * * People in and out of education are not at all happy with the traditional methods by which decisions get made. * * * Public interest in the politics of education has also grown out of the frustration of people who want to see reforms. * * * but who see them constantly blocked by the rigidities of a well entrenched bureaucracy. So they turn their attention to the problem of how to gain political leverage in education and of how radical change can be made in the schools. * * * As most people know by now, the distribution of governmental power in the United States is undergoing some fundamental changes. On the one hand, the federal government is exercising much more authority over state and local government * * *; on the other there is much talk of decentralization and many efforts to make state and local governments stronger than ever before. The result is called Creative Federalism by some and chaos by others." Koerner, Who Controls American Education? vii-viii, 3-4, 166 (1968).

The political tension in public schools traces back to the nullification in the McCollum case[4a/] of the option of public school parents to use their school buildings for private voluntary, religious instruction. The tension was heightened by the prayer and the Bible reading cases, which produced separate incommensurable constitutional tests for protection of free exercise of religion and for establishment of religion.[5/] Today, compulsion is required to establish a free exercise infringement, but not to show an establishment of religion; hence the protection of liberty is obviously stronger for those who oppose religious activity, than for those who oppose religiously offensive activity. Parents' complaints and opposition to the use

of sex educational materials and controversial books which they deem religiously and morally objectionable for their children have been rejected by courts, largely on the ground that the student or parent could elect to be excused from such courses and materials.[6] But where parents object to voluntary Bible reading or released time for religious instruction in the same public schools, the courts enjoin such practices as unconstitutional establishments of religion, notwithstanding the voluntary nature and parental ability to withdraw their children from those activities.[7] Courts take judicial notice that peer pressure and embarrassment from opting out of Bible reading may be coercive in establishment cases, but are not equally sensitive to the pressure exerted against opting out of sex education or vulgar reading courses. The oscillations between compartmented tests for kindred religious liberty claims have proven unworkable. Justice Burger wrote in 1970:

> "this Court has struggled to find a neutral course between two Religion Clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other." [8]

Given the Court's assignment of different weights and roles to the establishment and free exercise clauses, this purported balancing act may be likened to a circus rider trying to ride two horses which were bred for different tasks.

II

Case Origins of Contemporary Constitutional Guidelines

It is often forgotten that the modern line of cases on parental rights goes back to the 1920s, long before the First

Amendment religion clauses were applied to public schools. In Meyer, Pierce, and Farrington[9], the rights of parents to direct and control the education of their children were held to be substantive constitutional rights, and an aspect of liberty protected by the Fifth and Fourteenth Amendments. In striking down federal and state laws against the use of foreign language in private schools, and in nullifying Oregon's law that would force all children into public schools, the Supreme Court affirmed that parental rights, irrespective of their religion, were immune from unreasonable infringement by government. Parental prerogatives based upon religion came to the fore, as an independent right, much later in the flag salute case, and even that opinion stressed intellectual liberty more than religious freedom[10].

While Pierce expressly reserved the right of states to impose reasonable regulations upon private schools, both the later flag salute and Amish attendance cases made clear that even state regulation of public schools could not apply to abridge free exercise of religion unless the state could show a compelling need to enforce such regulations[11]. The clear examples are cases involving student health and safety (e.g. immunization laws[12]) but they are not helpful in disputes dealing with intellectual and moral values.

The separationist trend in constitutional interpretation sprang from the McCollum thesis that public schools could not be used for voluntary religious purposes; The Zorach decision upholding dismissal from the school for religious instruction proved to be more a tactical retreat from public

outcry than a basic shift to accommodation of religion reasoning,[13] as seen in the very selective use of Zorach since its appearance.

When the ensuing prayer, Bible-reading, and evolution cases more sharply drew the issue of religion in public schools, the Supreme Court, though continuing to protest neutrality, was forced to choose between favoring those who desired voluntary religious exercises under a theory of religious accommodation; and those who opposed such exercises under a separationist theory of establishment of religion. The Court attempted to maintain the appearance of neutrality by finding a separate constitutional test for each group, i.e. coercion is the trigger for free exercise violations, but aid or entanglement, no matter how non-coercive, is the trigger for establishment violations. That gambit, in my view, ignores the root problem of accommodating diverse religious interests in a pluralistic society, and it has ever since confounded constitutional reasoning. By extending this dichotomy to nonpublic education, the courts have produced the de facto result that it is better to deny citizen benefits to parents who exercise their constitutional rights and to place a questionable condition upon their exercise of those rights-than to risk, however minimally, aid to any religious interests, even though in the welfare setting, such an action would be held unconstitutional.[13a]

I need not chart for this audience the serpentine course of the nonpublic school aid cases. The latest brace of Supreme Court opinions in Wollman v. Walter[14] well summarizes the tortuous

developments since the Everson bus case in 1947. After thirty years and numerous precedents, Wollman produced five separate opinions and six different voting blocs among the Justices, on various forms of educational aid. The irrationality of the aid decisions appears in the prevailing distinction between provision of books (permissible) on one hand, and maps and globes or other instructional materials (impermissible) on the other; between in-school diagnostic services (permissible) and in-school therapeutic services (impermissible); and between standardized achievement testing services depending on who scores the tests. Apparently the constitution permits the state to trust private school teachers with instruction, grading and promotion for satisfaction of the compulsory education laws, but prohibits similar trust for purposes of measuring achievement for general record keeping.

Any lawyer can cull from the various Wollman opinions enough language to support a wide range of inconsistent constitutional principles--without even mentioning the Court's contrasting treatment of higher education aids.[15] The absence of a consistent rationale of religious liberty in education is not only evident from the Wollman review of precedents, but in the philosophical flip-flop taken by Mr. Justice Stewart between his dissenting plea in Schempp for the freedom of students to pursue religious exercises in public schools that are totally financed and controlled by government, and his later opinion in Meek that parents and children may not receive

even marginal government auxiliary aids if their parents elect to pursue religious education.[16]

The grant of direct citizen subsidy, viz. tuition vouchers, grants or allowance of tax relief to parents who choose qualified nonpublic education, would obviously maximize individual choice and minimize government intrusion, but this rationale has been clouded by the "conduit theory adopted in the Nyquist case to outlaw New York's system of tuition grants and tax relief to selected groups of non-public school parents.[17] To the extent that aid to a citizen is constitutionally equivalent to aid to his church, the court has, however unwittingly, imposed a religious test for citizen welfare that cannot square with equal protection or with government neutrality toward religion.

The special facts, and some opinion language, in Nyquist render it distinguishable from a uniform program of general assistance to all citizens but I doubt whether we will see universal tuition vouchers enacted in the near future.

The tuition tax credits, as proposed in Congress this past year offer somewhat better prospects. Analyses of the constitutional rationale for tax credits are recorded in the hearings before the House Ways and Means Committee.[18] To date, the federal courts (in New Jersey and Minnesota) have split on this issue, with one holding state income tax credits to be unconstitutional, and the other holding state tax deductions to be constitutional.[19] Should Congress or the states enact a general tax credit law for education below the college level, we may expect a decisive ruling from the Supreme Court.

In the rash of school-aid litigation, the Federal Elementary and Secondary Education Act received only token challenge by suit filings that have not yet been pressed to completion. The federal aid program thus remains in effect, even in the rare state, such as Missouri, where the state court barred state officials from administering any federal financial aid to parochial schools as a violation of the state constitution.[20] The barriers to government aid that are found under some state constitutions, e.g., with respect to publicly paid bus rides and state textbook loans[21] need not be pursued here, except to ask a broad question which the Supreme Court has avoided, namely: when does a state constitution that excludes religious school children from civil benefits that are permissible under the federal constitution, deny equal protection of the laws under the Fourteenth Amendment? Certainly not always, but this question has been deftly bypassed rather than confronted in the legal literature.[22]

It has been fashionable to distinguish cases on financial aid from disputes on government regulation of public and private education, but I believe their connection will become more obvious as the fiscal impact of government regulations deepens. The current attempts by the Internal Revenue Service to use the tax exemption as a club to force all private schools to undertake costly affirmative action programs;[23] and the attempts of state agencies to disqualify home education or private schools unless they can match the costly model of public education belie facile distinctions between government fiscal

and regulatory policy. The trend of government regulations threatens greater fiscal penalties than denial of educational benefits. The current attempts of the NLRB to control employee relations and wage negotiations in parochial schools is a clear example of intrusion that could be lethal. The implications are finally dawning on Mr. Justice Powell who exhibited considerable impatience with the fiscal pressure argument in Nyquist, but later voiced a drastically different attitude, and respect for parental interests in his concurring opinion in Wollman:

> "The persistent desire of a number of States to find proper means of helping sectarian education to survive would be doomed. This Court has not yet thought that such a harsh result is required by the Establishment Clause. Certainly few would consider it in the public interest. Parochial schools, * * * have provided an educational alternative for millions of young Americans; they often afford wholesome competition with our public schools; and in some States they relieve substantially the tax burden incident to the operation of public schools. The State has, moreover, a legitimate interest in facilitating education of the highest quality for all children within its boundaries, whatever school their parents have chosen for them. It is important to keep these issues in perspective. At this point in the 20th century we are quite far removed from the dangers that prompted the Framers to include the Establishment Clause in the Bill of Rights. * * * The risk of significant religious or denominational control over our democratic processes--or even of deep political division along religious lines--is remote, and when viewed against the positive contributions of sectarian schools, any such risk seems entirely tolerable in the light of the continuing oversight of this Court. Our decisions have sought to establish principles that preserve the cherished safeguard * * * without resort to blind absolutism. If this endeavor means a loss of some analytical tidiness, then that too is entirely tolerable. * * * [t]he Court reaffirmed Allen, thereby

necessarily holding that at least some such loans of materials helpful in the educational process are permissible--so long as the aid is incapable of diversion to religious uses. * * * and so long as the materials are lent to individual students or their parents and not to the sectarian institution." (433 U.S.___; 97 S.Ct. at 2613, 2614.)

III

Parents' Legal Options in Public and Private Education

Let us consider the options currently available to parents who are not fully satisfied with public education. The choice is not "take it or leave it." In theory at least parents have three possible options:

(1) Attempt to control and influence the public school that educates their children;

(2) Reject public education and pursue alternative education, at home or in private schools;

(3) Attempt to split the child's education between acceptable courses in public schools, and privately developed program, viz. through dual enrollment; or through part-time dismissal from public schools to obtain religious instruction elsewhere, on the Zorach model.*

The third option is not promising. Dual enrollment has not been legally tested in most states[24/], and it is not available on a broad scale in any school district. Fiscally pressed school districts lack the desire and means to mount such pro-

*The author is indebted to Prof. M. Chester Nolte, for some of the ideas and sources mentioned in this section. See Professor Nolte's paper, "Teaching Moral and Spiritual Values in Public Schools: Legal Implications" presented to annual convention of National Organization on Legal Problems of Education (Dec. 1, 1978).

grams; and private as well as public educators are unable or unwilling to solve the logistical problems of scheduling, transportation and resource allocations that dual enrollment entails.

The dismissal time approach has even less appeal. The problems of special student scheduling will also discourage dismiss time programs. Further, this arrangement is a but weak palliative for many parents who desire a structured education that integrates, permeates if you will, education with moral values in all courses and school relationships.

The remaining two options present more particularized problems that are best described by cases dealing with specific activities.

The Parent Role in the Public Schools. The parent's ability to influence the choice of educational materials or methods in his child's public school is limited both by law and by practical considerations. In curriculum management, religion is expressly barred; and religion-related subjects can seldom be assured of neutral presentation that satisfies the religious or moral preferences of all concerned. The Epperson case nullified a law that barred teaching of Darwinian evolution, but it was extended by lower courts to invalidate state laws that required public school texts on evolution to provide equal discussion of religious and materialist explanations of man's origins; and to reject a parent's objection that his child was subject to a purely materialist view of evolution by the public school teacher.[25] In the latter case, the court sidestepped the issue of preference between religious

viewpoints by limiting the case to the free exercise coercion test. Since the child was not coerced in the practice of his religion, no relief was granted.

Objections to sex education course content evoked similar judicial responses. Parental objections have been either rejected outright--as not involving substantial constitutional questions[26]--or turned aside on the ground that parents could withdraw their children from the challenged course[27]. The California court displayed typical lack of concern for the dilemma faced by public school parents. In a footstamping opinion, the court insisted that the state sponsored sex courses were religiously neutral. The one New Jersey case that recognized possible parental constitutional objections to religiously offensive sex education content, did so only at the pleading stage, and was later dismissed on procedural grounds[28].

Parental control over the inculcation of sex attitudes and values wanes further where sex material is launched not by school authorities, but by student newspapers. Public school student editors have conducted and published polls on student sex experience and attitudes, under the banner of the freedom of speech. The Second Circuit Court of Appeal upheld suppression of such a publication on presented expert evidence that the material was psychologically upsetting and harmful to youngsters, but the Fourth Circuit Court of Appeal thereafter found that school suppression of a similar student publication violated student First Amendment freedom of expression[29].

Given such case splits on the primacy of the student press, and the ineptness of many school district to prepare and present appropriate evidence of student harm, many parents remain legally powerless to bar offensive value inculcation by public school newspapers.

When school authorities attempt prepublication clearance of student newspapers, they encounter procedural barriers to prior censorship. Some courts require advance publication of narrow regulations that give clear and precise notice of what is prohibited, along with prompt procedures of review and clearance of all material that is not demonstrably disruptive. While the courts are divided on these matters, the Fourth, Fifth and Seventh Circuit Courts of Appeal required advance publication of narrowly drawn regulations, and nullified public school censorship under the vagueness doctrine.[30/] The Second Circuit Court of Appeal also required expeditious pre-publication review, but held that advanced published regulations by school authorities need not precede any ban or sanction of harmful literature.[31/] The difficulty of predicting what regulations are sufficiently clear and precise; of proving what material meets the "disruption" test; and the heavy administrative time and cost burdens imposed by the courts, understandably disincline public school authorities from exerting a close vigilance over the content of student publications. The acme of judicial intervention was reached by the Fourth Circuit decision of Nitzberg v. Parks[31a/] where the court for the fourth

time overturned school publication regulations because the regulation language, though lifted literally from the Supreme Court Tinker opinion, was unconstitutionally vague. In its one opportunity to clarify the constitutional limits of student press regulations, the Supreme Court avoided ruling on the merits and declared the case moot because the involved student had graduated.[32] Other examples of judicial avoidance of the merits in controversial student publications include cases that voided, for vagueness, regulations which prohibited "advocacy of illegal action and gross insult to a group or individual," and "illegal action or disobedience to published rules."[33] While there is great variation in case law, the foregoing examples illustrate the point that the parents' voice cannot be controlling or even very effective in the typical community where intergroup conflict rather than consensus prevails.

The impact of instructional material on the intellectual and moral development of impressionable children is undeniable, yet the public school cases dealing with controversial texts, course readings, and library books devalue parental prerogatives in focusing upon student rights and teacher academic freedom. In the much publicized textbook battle in Kanawa County, the parents' religion grounded objections were turned aside with the observation that "the [First] Amendment does not guarantee that nothing about religion will be taught in the schools, nor that nothing offensive to any religion will be taught in the schools."[34] Similar parental objections failed in New Hampshire

and in Michigan.[35] While the novel--Slaughterhouse Five-- was judged by parents to be derogatory of Christianity, the Michigan court decided that the novel's derogatory references to religion were appropriate literature, not anti-Christian and further that teacher neutrality in handling the book's discussion could be relied upon to cure its potential anti-religious impact. Jewish citizens fared no better in opposing the use of "Oliver Twist" in New York because of its stereotyping impact on the young.[36]

Parental complaints against teacher assignment of "outside" books that are not approved by the school board,(viz. one entitled "Trips; Rock Life in the Sixties,") were shunted aside by dismissal on technical procedural grounds.[37] The bifocal view of religion-related constitutional objections necessarily disables parents to control their children's reading. It sustains objections to public education programs that advance religious viewpoints under the Establishment Clause, as was properly done to nullify the Florida statute that called for the teaching of "Christian virtue,"[38] but it blunts objections to anti-religious material by applying the coercion-of-practice test of the free exercise clause, or by invoking countervailing doctrines against censorship of student or teacher expression.

The control of instructional material to preserve familial values is further complicated by notions of teacher academic freedom in the public schools. The case law is very confused in this area because the concept of academic freedom was developed

for autonomous higher education communities which are clearly distinct from child education.[39] The public school academic freedom cases thus lack a unifying theme. In struggling with this concept, the First Circuit Court of Appeal first overturned an English teacher's discharge for assigning a reading that contained heavy treatment of a vulgar epithet (M--F--); then sustained a ban of an offensive art display in a university campus because passerby women and children were exposed to it; then declined to rule on the legality of dismissing a teacher for brief discussion of a taboo work in class, with the final candid admission: "We confess that we are not of one mind as to whether plaintiff's conduct fell within the protection of the First Amendment."[40] In refusing to follow the First Circuit, the Second Circuit Court of Appeal upheld a school board's decision to remove a book (Down These Mean Streets) from a junior high school library, and added a tart comment on the First Circuit's diminishing urge to venture judgments in such matters.[41]

Parental objections to controversial texts were further blurred by other courts which subdivided the issue of library books between permissible refusal of boards to approve offensive books, and impermissible board removal of offensive books once they were placed in a school library.[42] One could go on citing many cases that present a confused and checkered pattern of judicial balancing of student, teacher, school board, and parental interests,[43] but the end result is that parental concern regarding instructional content either in public school texts, class

discussion, or library materials, is only one factor and a minor one at that, which courts must consider in reviewing controversial material.

The latest decision in this area, by a federal court in Massachusetts, considered a vulgar poem by a youngster that was at best crude, and at worst pornographic. The heightened concern there shown for freedom of expression and procedural regularity qua teachers and students foreclosed any consideration of the parents' right to shield their children from deleterious and explicitly vulgar references to sexual lechery.[44/] Though the court allowed the library to limit release of the book only on parental consent, it was but a short step for one student to take the book out and share the purple passages with all others, be they willing or unwilling listeners.

As the law now stands, there is no way to reconcile the divergent interests of the public school community. The segmented laws on school board authority, teacher academic freedom, student expression and liberty, and parental rights seldom dovetail to produce an result acceptable to all. The bundle of legal rules are offshoots, rather than a rational framework for the intractable problems of pluarlism.

These problems are aggravated in public schools that predominantly or exclusively educate a single minority, whose culture differs markedly from that which is fostered by state mandated curriculums and by state certified teachers who are drawn from the "mainstream."[45/] Subculture consumers of public education, be they blacks, eskimos or religious sects, are seldom the voting majority that elect school boards or influence state

educational standards. The courts are ill equipped to determine whether and when public schools should be made to adopt special educational needs of a concentrated minority, but they are necessarily the last place of resort to solve parental-school conflicts.

Standardized state education is also troublesome for children suffering from physical, emotional, or mental handicaps. Their inability to adjust to a regime that differs markedly from their accustomed environment poses one of the most serious puzzles of special education. On the one hand, federal and state policy demand mainstreaming wherever practicable, while recognizing that remediation of special needs may require placement in special schools. While the law attempts to assure due process and involvement of parents in determining what is an "appropriate education" for a handicapped child, value judgments on their emotional, moral, as well as instructional needs by parents and by educators will often clash, especially as to placement with public vis-a-vis private schools. The relationship of a teacher or counselor's value system vis-a-vis the family's value system can be critical in handling children with mental or emotional handicaps.[46/] It remains to be seen how courts will rank parental choice relative to the official decisions as to the kinds of schools and programs that are appropriate for developmentally disabled children. In such cases parents face the formidable authority and technical resources marshalled by the educational bureaucracy. Since these encounters involve one-on-one relationships in evaluating a single child's needs rather than a diverse

constituency, the parent-state conflict is clearly put. If each party has a colorable basis for conflicting positions, the courts will hopefully uphold the parents' choice as a matter of preeminent fundamental rights, but that hope is tarnished by judicial deference to administrators who, in the name of the state, often claim the right to act as substitute parent by virtue of their superior knowledge.

Alternatives to Public Education. Parents who have the necessary resources to pursue alternative courses of non-public education have different problems, but these alternatives are also subject to reasonable state regulations.[47] Mr. Justice Holmes once remarked that general propositions do not decide concrete cases, and the current rash of litigation between state administrators and private educators over what state standards are reasonable for approval of private education proves his point. The questions whether particular state standards are (a) authorized by law and (b) reasonable in their terms; are compounded in a third, namely (c) whether their application would infringe the free exercise of religion by particular individuals. The requirement of "reasonableness" is both substantive as to content, and procedural as to fairness, i.e., adequate notice (vagueness) and fair procedures. The cases you will be discussing in this clinic highlight the importance of these principles to parents who face prosecution for opposing state educational standards.

The laws of most states test the validity of private schooling and of home education under different criteria, but common issues of immunity from state regulations affect both

alternatives. In exempting the Amish totally from compulsory high school attendance, the Yoder case established a constitutional standard of exemption based upon free exercise of religion. That case, however, does not reach the more difficult questions of partial exemption from selected portions of state regulations, or the question whether parents whose objections are not religion-based are entitled to like immunities under the substantive due process rights that were upheld in the early cases of Meyer, Pierce and Farrington.[48/] The home education cases, which I will discuss later, pose this issue, if only indirectly, under the analysis of what is a "reasonable" exercise of state police power.

Nonpublic Schools. The established church-related schools had little difficulty in meeting state educational standards in the past because the states were quite lenient in formulating and applying standards for private school approval. But even those schools, along with newer private schools, are now encountering increasing government strictures that threaten their very existence.

Of immediate interest is the case now pending Supreme Court review on the question whether the National Labor Relations Board may constitutionally exercise jurisdiction over the employment practices of church-related schools at the pre-college level.[49/] Obviously, any religion-based constitutional barrier to federal labor jurisdiction under the First Amendment would also bar state labor jurisdiction under the Fourteenth Amendment. The lethal ideological potential of government control over disputes on teacher selection, compensation and discipline for conduct, in

or out of private schools, where the school administration and parents believe that virtue is taught by example as well as by precept, is evident from the public school decisions that reject the role-model or exemplar function of teachers. In overturning public school teacher dismissals for disapproved conduct a growing number of courts require specific clinical proof, rather than an educational principle, that a connection does exist between a public school teacher's conduct or life-style and his or her teaching fitness.[50] As secular agents, labor boards and officials can be expected to follow the rules against rejection or firing teachers for conduct that contradicts religious teaching or goals of the private school, absent affirmative proof that the children or instruction was specifically affected, but clinical proofs on intangible influences are hard to come by. Further, the experience of public school boards with teacher unions on accountability standards leaves little doubt that parental control of their private school environment would be largely emasculated by the interposition, often biased interposition, of politically appointed labor relations officials and split-the-difference arbitrators.

Finally, should private school resources be strung out by officially forced bargaining, arbitration and unfair labor practice proceedings, their limited resources will be so diluted or exhausted by labor management that little may be left for education.

Even greater fiscal peril is threatened by the Proposed Internal Revenue Service Procedure on private tax-exempt schools.[51]

It would strip tax exemption from many racially imbalanced schools under IRS standards that in effect presume certain schools to be prima facie guilty of racial discrimination based upon the existence of desegregation orders against an overlying public school district unless that school expend money and resources (which it probably cannot afford) in ways dictated by the IRS procedure. These regulations are directed primarily, but not exclusively, against the newer segregated academies, but they are not fine-tuned to cover only schools that are animated by racial discrimination rather than by other considerations. The sincere religious or intellectual aspirations of many parents should not be ground under by this steamroller approach to racial integration. Nor should private school parents who oppose having their children bused excessive distances to possibly hazardous enrivonments be presumed to be racists, or their interests in child welfare and safety summarily brushed aside as insubstantial.

The denial of income tax exemption to a fiscally pressed nonprofit private school is the sure way of driving it out of existence. Hopefully these proposed regulations will be modified or abandoned after pending agency hearings.

Should the proposed regulations be adopted, they will surely be challenged as not authorized by Congress; as an arbitrary and capricious exercise of discretion; and as an overbroad and unconstitutional abridgement of religion and parental rights. In that event the Supreme Court tax exemption decision (Waltz) may be extended to prohibit the national government from using its taxing authority in ways that infringe fundamental rights.

State accreditation authority over smaller religious schools was tested in three recent decisions from Ohio, Kentucky, and North Carolina.[52/] The latter two are presently on appeal. In the Whisner case, the Ohio Court of Appeal reversed truancy convictions of ten parent patrons of a Christian Bible school that refused to seek a state charter or approval since that action would express acquiescence in the validity of the state's approved standards. A few justices concurred in the result on findings that the state regulations were unconstitutionally vague and denied due process. The court majority, however, found that the state board's "minimum standards" unreasonably and impermissibly infringed upon the natural rights of the defendant parents; that they abridged the free exercise of religion because the state failed to prove any compelling state interest to require practices offensive to the religious beliefs of the parents, namely: that the school be involved in community activities and in the pursuit of community goals; that the state's command to promote social attitudes comported more with a philosophy of humanism rather than Biblical injunctions that call for separation from worldly goals; and that the state allocation of secular instruction time reduced the school period for Bible study. By resting decision upon state constitutional grounds as well as the federal constitution, the Ohio court discouraged appeal on the federal question. The court's disapproval of official attempts to force private education into the mold of state dictated public education was explicit in its rejection of detailed regulations that would eradicate most distinctions

between public and private schools.

The Whisner case is, by far, the strongest modern judicial statement applying the natural rights theory of the Pierce case as a limitation on state regulation of private schools. Only a full reading of that opinion can adequately reflect its defense of the primacy of parental roles in education. The opinion also demonstrates the importance of careful trial preparation by counsel of testimony by involved parents and by educational experts. Such testimony is indispensible to analyze and rebut official explanations of intricate regulations that camouflage sensitive ideological aspects of child education.

The Whisner approach was adopted in the Kentucky decision (now on appeal), which enjoined truancy prosecutions of parents with children in religious schools that also lacked state approval. The parents there attached state accreditation requirements that posed, in the words of the court:

> "irreconcilable philosophical differences between their educational concepts, notions of textbook and curriculum content and teacher qualification. The differences * * * having a foundation in firmly held religious belief. Expert testimony in this case certainly established that there is not the slightest connection between teacher certification and enhanced educational quality * * *. * * * The state is unable to demonstrate that its regulatory scheme applied to public schools has any reasonable relationship to the supposed objective of advancing educational quality; * * * plaintiffs, on the other hand, have shown that without benefit of the state's ministrations their educational product is at least equal to if not somewhat better than that of the public schools; in purely secular competence."

In both the Ohio and Kentucky opinions, evidence was produced to establish that the academic achievement of the private school students was comparable, if not better than, public school students. In the Kentucky case the plaintiffs admitted only to state jurisdiction over health, fire and safety standards for all schools, but offered to submit their students to standardized testing as a condition of state approval of the school. The Whisner parents had stipulated to a broader recognition of state power to impose reasonable education requirements subject, however, to the limitation against any application that would infringe free exercise of religion.

Less decisive, but still partially supportive of the foregoing principles, is the North Carolina decision where the state board of education sued eleven Baptist private schools for a declaratory judgment that it could lawfully regulate those schools, and to enjoin them from ignoring state regulations. After detailing the extensive North Carolina regulations of non-public school teacher qualifications, curriculum, textbooks, school organization, and other requirements, the trial court upheld many regulations which were found offensive in Whisner and Columbus, but it nullified, as unauthorized and unconstitutional under the state charter, other regulations that imposed equivalent public school standards on the nonpublic schools regarding textbooks, teaching staff, and school facilities and equipment. The court then straddled and found no general statutory or regulatory infringement of parental rights or free exercise of religion.

It is difficult to reconcile these legally inconsistent findings, and I believe that they will be modified, one way or the other, by the state appeals court.

The judicial reluctance to sustain criminal prosecutions against parents who enroll their children in unapproved private schools is not universal[53], but it is evident in recent cases. A Vermont court held that truancy conviction could not stand without proof that the private education was not "equivalent" to public education even though the school itself was not officially approved[54]. Where state statutes only require state approval of private school without prescribing legislative requirements, state agency general approval suffices even though a school does not meet the standards prescribed for public schools[55].

Since many states have little or no regulation for private school approval, and since approval standards and regulations vary considerably from state to state, the above mentioned decisions from Ohio, Kentucky and North Carolina may be adopted elsewhere to support the doctrine that a state's requirements for private school accreditation must bear a reasonable relationship to its interest in minimally adequate education rather than to the maximum aspirations of its public schools; and that such regulations must serve a compelling state interest where they clash with fundamental rights of parents to direct their children's upbringing. Certainly there is recent as well as traditional case support to nullify open-ended regulations that are not confined by statute under the constitutional doctrine against unlawful delegation of lawmaking power[56].

Home Instruction. The legal right of parents to educate children at home arguably could be grounded in a fundamental rights theory under the Fourteenth Amendment, namely, that the state's justification or jurisdiction over a child's education does not exist where a parent provided adequate education in his or her own way. While this view of the state's role, as secondary insurer of citizen development, is supported by the language of some cases, a federal court recently ruled squarely that a parent has no affirmative constitutional right of educating, free of state regulation, a child at home.[57] At any rate, the question remains--what is an adequate education? This issue of equivalence of home education thus becomes the crux of home education disputes. To determine that issue, most courts have looked to the exemption provisions of the state compulsory attendance statutes. About 31 states now have statutes that recognize equivalent home education as an alternative to public schools. The variation in the wording and construction of state statutes, however, is considerable. They are well summarized in a 1975 ALR annotation and in a 1967 survey opinion by a New Jersey court.[58] Briefly stated, the case lines reveal that older decisions, let by a Massachusetts case[59] which is a keystone of one of the papers to be presented later in this clinic[60] construed the statutory exemption broadly, to allow home education under a standard of achievements, namely, learning which was in the court's view "sufficient" or "comparable" though not parallel to formal schooling. Under the achievement standard the parent's lack of formal teaching training or departure from a state prescribed curriculum was not controlling.[61] In

stressing the parents' primary role in education these cases cast upon the state prosecution the burden of proving inadequacy of home instruction in terms of achievement, rather than in terms of comparability to teaching resources and curriculum of formal schooling.

The majority of state courts, however, adopted a test of comparability of educational resources and coverage, but then split in their judgment of what is sufficiently comparable. New Hampshire held that only education in an institution that qualified as a school could be exempted from public education,[62] while California, Ohio, Virginia and Washington statutes were construed, and enforced, to disqualify home instruction when not conducted by a state qualified teacher.[63] The contrary view, upholding home education by properly equipped, though uncertified, parents prevailed in New York, New Jersey and Illinois.[64]

In addition to the matter of teacher qualification, the majority of courts upheld state approval requirements on daily hours of instruction and core curriculum coverage. But the attempts of state officials to disapprove all home education because it lacks peer learning and socialization with other children was explicitly rejected in the leading New Jersey decision on that issue, and was implicitly rejected by the earlier cases from Massachusetts, Indiana and Illinois.[65]

Even more decisive than the substantive criteria for home education, are the adjective law issues of administrative authority and due process. The use of standardless statutes and of vague

administrative guidelines to support official decisions to disallow home instruction are fruitful grounds to overturn prosecution under compulsory attendance laws. As the record and brief in the Perchemlides case[66/] (which you will be reviewing) illustrates, public education officials and administrators often assert questionable authority to act with unbridled discretion and often deny due process to parents not only by vague, overbroad and confusing regulations; but by denial of fair notice of agency objections to home instruction; by denying them the rights of hearing, of confrontation, and of legal counsel in agency decision making. Since parental interests in these cases are substantial and constitutionally protected, these rights are mandated by constitutional due process. Certainly the right to educate one's children, and to fairness in proceedings that threaten criminal penalties cannot be swept aside without constitutional safeguards. The constitution aside, judicial protection against arbitrary and capricious abuse of administrative discretion is always available under general administrative law.

More often than not, resistance to adverse official rulings on home education and to consequent threatened prosecution will command more judicial sympathy under the foregoing battery of procedural protections. It is also more economical to invoke these protections preliminarily than to rush into trial on the merits of particular home education.

Having noted the case law on home instruction, I must add two caveats that may well rob them of current force, namely, that many of the home-education cases preceded modern development

of constitutional doctrine; and that drastic changes in the scope, conditions, and techniques of modern education will require fresh judgments by courts as to what is now equivalent or sufficient education in a particular locality. Certainly, the Yoder, Whisner, Hinton, and Columbus[67] decisions add new dimensions to the body of older decisions.

In closing this overview of legal developments, I am acutely aware that the restrictions of time force me to leave many significant areas untouched, if not overlooked--such as the impact of federal and state statutes governing special education and group discrimination. I take some comfort, however, in the fact that this clinic has just begun and that the presentations that follow will fill many of the gaps which I have left.

FOOTNOTES

1. West Virginia State Board of Education v. Barnette, 319 U.S. 624, 641 (1943).
2. IDEM
3. Id. at p. 642
4. Id. at p. 640

4a. Ill. ex rel. McCollum v. Board of Education, 333 U.S. 203 (1968)

5. School District of Abington Township v. Schempp, 374 U.S. 203 (1963)
6. See discussion p. 3 et seq.
7. See footnote 5, supra (Frankfurter J., concurring).
8. Lemon V. Kurtzman, 397 U.S. 664, 668-9 (1970).
9. Meyer v. Nebraska, 262 U.S. 390 (1923); Farrington v. Tokushige, 273 U.S. 284 (1927); Pierce v. Society of Sisters, 268 U.S. 510 (1925).
10. See fn. 1, supra.
11. IDEM; Wisconsin v. Yoder, 406 U.S. 205 (1972).
12. Jacobson v. Mass., 197 U.S. 11 (1905); Zucht v. King, 260 U.S. 174 (1922).
13. Ill. ex rel. McCollum v. Board of Education, 333 U.S. 203 (1948); Zorach v. Clausen, 343 U.S. 306 (1952).

13a. See, e.g., Sherbert v. Verner, 374 U.S. 358 (1963).

14. Wolman v. Walter, 433 U.S. 229 (1977).
15. See Tilton v. Richardson, 403 U.S. 672 (1971); Hunt v. McNair, 413 U.S. 734 (1973); Roemer v. Board of Public Works, 426 U.S. 736 (1976). Smith v. Board of Governors, 434 U.S. 803 (1977); Americans United for Separation of Church & State v. Blanton, 434 U.S. 803 (1977).
16. Compare dissenting opinion by Mr. Justice Stewart in Schempp, fn. 5, supra., with Meek v. Pittenger, 421 U.S. 349 (1975).

17. Comm. for Public Education v. Nyquist, 413 U.S. 756 (1973).

18. "Tax Treatment of Tuition Expenses," Hearings before the Comm. on Ways & Means, House of Rep., 95th Cong., 2nd Sess., Feb. 14-21, 1978 (Ser. 95-56).

19. Public Funds v. Byrne, 444 F.Supp.1228 (D.N.J. 1978) aff'd ____, F.2d _____(3d Cir. 1979); Minn. Civil Lib. Union v. Roemer, 452 F.Supp.1316(D. Minn. 1978).

20. Wheeler v. Barrera,417 U.S. 402 (1974), 422 U.S. 1004 (1975); Mallory v. Barrera, 544 S.W. 2d 556 (Mo. 1976)(Federal Aid Administered directly from federal agency under "bypass" probations of federal statute).

21. See e.g., Dickman v. School District, 366 P.2d 533 (Oregon 1961); Opinion of the Justices, 216 A.2d 668 (Del. 1966) (Bus Transp.).

22. See Note, Developments in the Law--Equal Protection, 82 Harv. L. Rev. 1065 at 1128, (1968).

23. Proposed Rev. Procedure on Private Tax Exempt Schools, filed 8/21/78; 43 Fed. Reg. No. 163, at 37296.

24. Compare Citizens to Advance Pub. Educ. v. Porter, 237 N.W. 2d 232 (Mich. 1976)(Upheld) with Fisher v. Clarkamas Cty. School District, 507 P.2d 839 (Ore. 1973) (voided as a false dual enrollment program).

25. Epperson v. Arkansas, 393 U.W. 97 (1968); Daniel v. Waters, 515 F.2d 485 (6th Cir. 1975); Wright v. Houston Ind. School District, 486 F.2d 137 (5th Cir. 1973) cert. denied; Brown v. Houston Ind. School District, 417 U.S. 969 (1974).

26. Cornwell v. State Board of Education, 428 F.2d 471 (4th Cir. 1970); cert. denied 400 U.S. 942 (1970).

27. Citizens for Parental Rights v. San Mateo County Board of Education, 124 Cal. Rptr. 68 (1975); Medeiros v. Kyosaki, 478 P.2d 314 (Hawaii 1970); Hobalth v. Gre nway, 218 N.W. 2d 98 (Mich. 1974).

28. Valent v. N.J. State Board of Education, 274 A.2d 832 (N.J. 1971).

29. Compare Trachtman v. Anker. 562 F.2d 512 (2d Cir. 1977); cert. denied 435 U.S.925 (1978); with Cambino v. Fairfax City School Board, 515 F.2d 504 (4th Cir. 1977).

30. Nitzberg v. Parks, 525 F.2d 378 (4th Cir. 1975); Jacobs v. Board of School Commissioners, 490 F.2d 601 (7th Cir. 1973); Shanley v. Northeast Industrial School District, 462 F.2d 960 (5th Cir 1972); Leibner v. Sharbaugh, 429 F.Supp. 744 (D. Va. 1977).

31. See Eisner v. Stamford Board of Education, 440 F.2d 803, 808 (2d Cir. 1971).

31a. See fn. 30 supra.

32. See Indianapolis Sch. Commissioners v. Jacobs, 420 U.S. 128 (1975).

33. Baughman v. Feienmuth, 343 F.Supp. 487 (D. Md. 1972); Sullivan v. Houston Ind. School District, 333 F.Supp. 1149 (D. Tex. 1971).

34. Williams v. Board of Education, 530 F.2d 972 (4th Cir. 1975).

35. Todd v. Rochester Comm. Schools, 200 N.W. 2d 90 (Mich. 1972); David v. Page, 395 F.Supp. 395 (D. New Hampshire 1974).

36. Rosenberg v. Board of Education, 92 N.Y.S. 2d 344 (1949).

37. Carol v. Lucas, 313 N.E. 2d 864 (Ohio 1974).

38. Meltzer v. Board of Pub. Instr., 548 F.2d 559 (5th Cir. 1977).

39. Cf. Keyishian v. Board of Regents, 385 U.S. 589 (1967).

40. Compare Keefe v. Geanackos, 418 F.2d 359 (1st Cir. 1969); Close v. Lederle, 424 F.2d 988 (1st Cir. 1970); Mailloux v. Kiley, 436 F.2d 565 (1st Cir. 1970).

41. President's Council, District 25 v. Community School Board No. 25, 427 F.2d 289 (2d Cir. 1972).

42. Compare Carey v. Board of Education, 427 F.Supp. 948 (D. Colo. 1977) (upholding board refusal to acuqire certain texts--The Exorcist and A Clockwork Orange), with Right to Read Defense Committee v. School Committee, 454 F.Supp. 703 (D. Mass. 1978); cf. Minarcini v. Strongsville City School District, 541 F.2d 577 (6th Cir. 1976).

43. See, e.g., Moore v. School Board of Gulph County, 364 F.Supp. 355 (N.D. Fla. 1973); State v. Board of Directors, 111 N.W.2d 198 (Wis. 1961); Palo Verde Unified School District v. Hensey, 9 Cal. App. 2d 967 (1970; Lindorse v. Governing Board of Torrance Unified School District, 9 Cal. 3d 524 (1973); Celestine v. Lafayette Parish School Board, 284 So. 2d 650 (La. 1973).

44. See Right to Read Defense Committee v. School Committee, supra.

45. **See, e.g., Hootch v. Alaska St. Op. Sch. System, 536 P.2d 793 (Alaska 1975).**

46. **See In the Matter of Samuel E to be discussed in this clinic. Cf. Application of Auster, 100 N.Y.S.2d 60 (1951).**

47. **See. e.g., Pierce v. Society of Sisters, 268 U.S. 570, 534 (1925); Wisconsin v. Yoder, 406 U.S. 205, 236 (1976).**

48. See fn. 9, supra, and related text.

49. NRLB v. The Catholic Bishop of Chicago, No. 77-752 (cert. granted 2/21/78).

50. See, e.g., Morrison v. State Board of Education, 461 P.2d 375 (Cal. 1969); Willemsen, Sex and the School Teacher, 14 Santa Clara Lawyer, 839 (1974).

51. See fn. 23, supra.

52. State v. Whisner, 351 N.E. 2d 750 (Chi. 1976); Hinton v. Kentucky State Board of Education, Civil ACtion No. 88314, Franklin Cir. Ct. (1978); State of North Carolina v. Columbus Christian Academy, Sup. Ct. Div. No. 78 CVS 1678 (1978).

53. Application of Auster, 100 N.Y.S. 2d 60 (1951).

54. State of Vermont v. LaBarge, 134 Vt. 276 (1976).

55. Santa Fe Comm. School v. New Mexico State Board of Education, 518 P. 2d 272 (New Mex. 1974).

56. State v. Williams, 117 S.E. 2d 444 (N. Carolina 1960).

57. Scoma v. Illinois, 391 F. Supp. 452 (D.Ill. 1974).

58. See Annotation--Attendance at Private or Parochial Schools, 65 A.L.R. 3d 1222 (1975); State v. Massa, 231 A.2d 252 (N.J. County Ct. 1967).

59. Perchemlides v. Frizzle, Mass. Sup. Ct. #16641, now pending appeal.

60. Comm. v. Roberts, 34 N.E. 402 (Mass. 1893); People v. Levison, 90 N.E. 2d 213 (Ill. 1950); cf. State v. Peterman, 70 N.E. 550 (Ind. 1004).

61. There is some confusion in the case law as to where the burden of proof lies in prosecutions against parents under the education statutes. Compare Scoma v. Illinois, 391 F.Supp. 452, 462 (N.D. Ill. 1974) with State of Vermont v. LaBarge, 134 Vt. 276 (1976).

62. State v. Hoyt, 146 A. 170 (N.H. 1929).

63. In re Shinn, 16 Cal. Rptr. 165 (1956); State ex rel. Shoreline School District, 346 P.2d 999 (Wash. 1960); Rice v. Comm., 49 S.E. 2d 342 (Va. 1948); Parr v. State, 15 N.E. 555 (Ohio 1937).

64. People v. Turner, 98 N.Y.S. 2d 886 (1950); State v. Massa, supra; People v. Levison, supra.

65. See fn. 60, supra.

66. See fn. 59, supra.

67. See fns. 47, 52, supra.